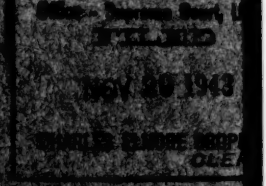


No. 478

In the Supreme Court of the United States

OCTOBER TERM, 1943

[redacted], A. C., PETITIONER

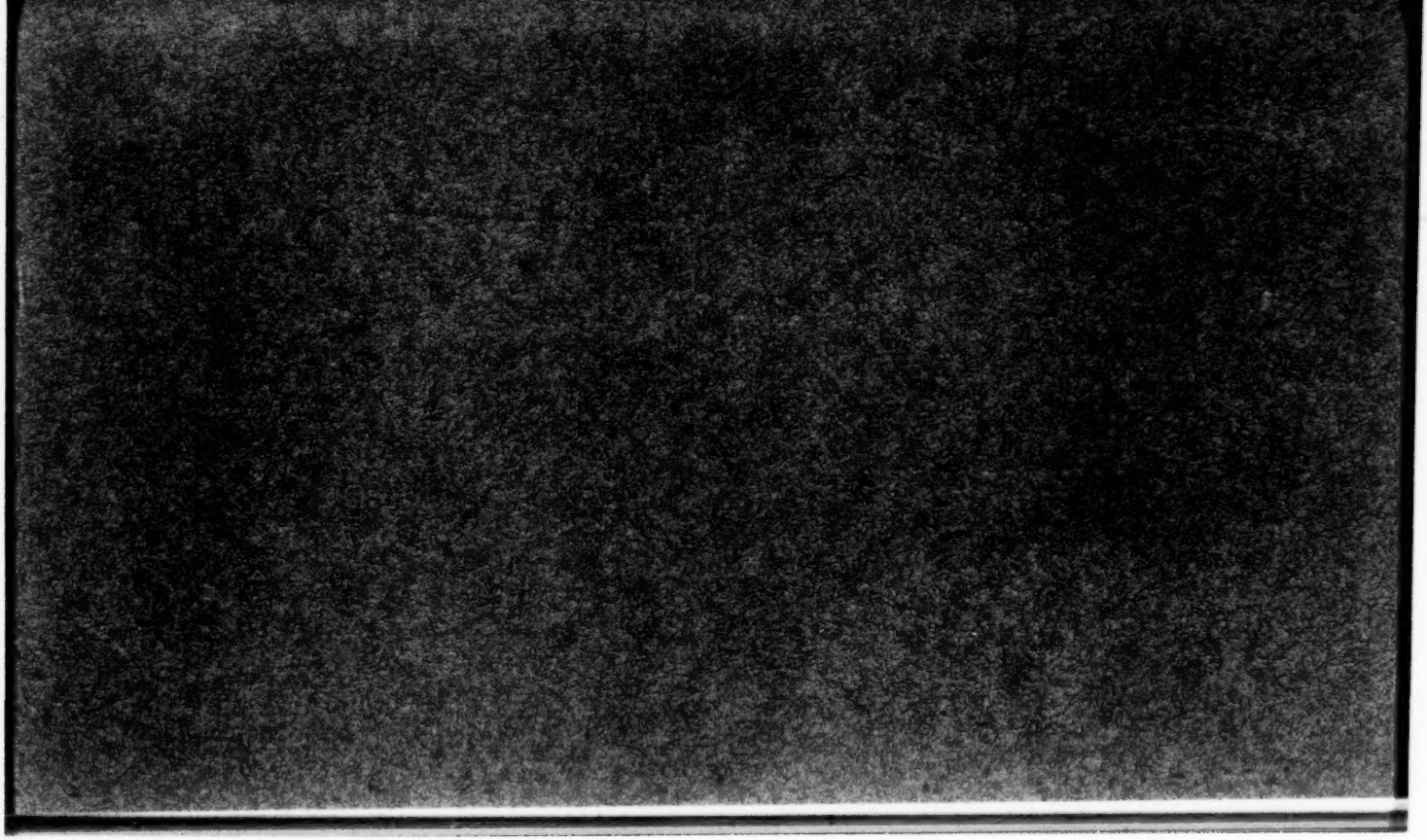
v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[redacted]

BRIEF FOR THE [redacted]



INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	2
Argument	3
Conclusion	8
Appendix	9

CITATIONS

Case:	
Helvering v. *Credit Alliance Corp.*, 316 U. S. 107	5
Statutes:	
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 27	3, 6, 7, 9
Sec. 102	7
Sec. 233	3, 9
Sec. 235	9
Sec. 291	3
Sec. 351	3, 4, 7, 9
Revenue Act of 1937, c. 815, 50 Stat. 813:	
Sec. 1, adding Sec. 352 to the Revenue Act of 1936	4
Miscellaneous:	
H. Rep. No. 704, 73d Cong., 2d Sess., pp. 11–12 (1939–1 Cum. Bull. (Part 2) 554, 562–563	7
H. Rep. No. 2475, 74th Cong., 2d Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 667, 674)	6
Preliminary Report of the Subcommittee of the House Ways and Means Committee entitled Prevention of Tax Avoidance, 73d Cong., 2d Sess., p. 7	7
S. Rep. No. 558, 73d Cong., 2d Sess., pp. 13–14 (1939–1 Cum. Bull. (Part 2) 586, 596–598)	7
Treasury Regulations 94:	
Art. 351–1	13
Art. 351–2 (as amended by T. D. 4759 (1937–2 Cum. Bull. 117, 118)	3

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FIDES, A. G., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 43–50) is reported in 137 F. 2d 731 and the opinion of the United States Board of Tax Appeals (R. 26–34) is reported in 47 B. T. A. 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 16, 1943 (R. 51). The petition for a writ of certiorari was filed November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the taxable year 1936 the taxpayer was a personal holding company within the meaning of Section 351 of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 9–14.

STATEMENT

The taxpayer is a nonresident foreign corporation. It was not engaged in trade or business in the United States during the taxable year nor did it have an office or place of business therein. During the last half of the taxable year, more than 50 percent of the value of its outstanding stock was held by not more than five individuals. All of its stockholders were nonresident aliens during that year and at all times prior thereto. (R. 28.) During the taxable year, the gross income of the taxpayer from sources within the United States was $66,504.53. All of its income consisted of interest and dividends. (R. 28–29.)

On January 3, 1940, the taxpayer filed a personal holding company return for 1936 with the Collector of Internal Revenue at Baltimore, Maryland, under protest (R. 30).

The Commissioner ruled that the taxpayer was a personal holding company under Section 351 of the Revenue Act of 1936 and determined a deficiency in personal holding company surtax of

$9,427.71 (R. 14, 17).[1] The Board of Tax Appeals upheld the Commissioner (R. 30–34), recomputing the surtax deficiency in the amount of $9,004.26 due to corrections not in question (R. 35). The Circuit Court of Appeals affirmed (R. 43–50).

ARGUMENT

The Circuit Court of Appeals held that the taxpayer is a personal holding company within the specific statutory definition and that a literal application of the statute does not lead to "absurd results or arbitrary discrimination" (R. 48). We submit that there is no conflict and that the decision is correct.

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[1] In computing the personal holding company surtax, the Commissioner refused (R. 17, 30) to allow the taxpayer a credit, under Sections 351 (b) (2) (C) and 27 (a) of the 1936 Act (Appendix, *infra*, pp. 9, 11–12), on account of a dividend declared and paid by it during the taxable year in Swiss marks, equivalent to $28,041.25, and to allow certain claimed deductions (R. 29). This action was taken under Section 233 of the 1936 Act (Appendix, *infra*, p. 9), on the ground that the return of January 3, 1940, did not include information necessary for calculation of the credit and asserted deductions (R. 16, 30). The Commissioner further determined that the taxpayer was subject to a 25 per cent penalty under Section 291 of the 1936 Act, of $2,356.93 (R. 14, 17).

The Board of Tax Appeals sustained the Commissioner as to the denial of the credit and deductions (R. 33–34), and this was not questioned in the Circuit Court of Appeals (R. 45). As to the imposition of the penalty, the Board sustained the Commissioner (R. 33), and the court below affirmed (R. 50). The petition does not seek review of these issues.

As the taxpayer states (Pet. 2), this is the first case decided upon similar facts by the Board of Tax Appeals, and also the first to be reviewed by any circuit court of appeals. It follows that there is no conflict on the question decided. The claimed conflict (Br. 13–14) is based upon the refusal of the court below to hold that, in order to carry out the alleged Congressional intent, the statutory language should be given a meaning other than its literal meaning. But the court below took into account the line of cases in which this Court has deemed a departure from the literal meaning of a statute to be warranted, and, appraising the considerations advanced on their merits, held that here there was no sufficient reason for refusing to apply the statute as written (R. 47–48). Thus, the claim of conflict dissolves into nothing more substantial than an argument that the instant case was erroneously decided by the Circuit Court of Appeals.

The case was correctly decided below. The year involved is 1936 and the controlling statutory provision is Section 351 of the Revenue Act of 1936 (Appendix, *infra*, pp. 10–12). In 1937 Congress amended the personal holding company statute so as to exclude "foreign" personal holding companies as defined in the 1937 Act; it provided, however, that the exclusion should not apply to earlier years. (See Section 352 (b) as added to the Revenue Act of 1936 by Section 1 of the Revenue Act of 1937, c. 815, 50 Stat. 813.)

This would seem to be virtually decisive against the taxpayer for the year 1936.

The primary basis for the contention that Congress did not intend to apply the tax to foreign personal holding companies is that it would be unreasonable and absurd to apply the tax to foreign companies because (1) the sole purpose of the tax was to require the distribution of dividends to stockholders who would then become liable for the tax, and (2) the stockholders of foreign companies are not subject to tax upon dividends received and a foreign corporation could therefore never qualify for a dividends-paid credit even if it actually distributed its earnings.

1. The court below adequately disposed of the contention that the tax had no other purpose than to require distribution to stockholders who would thereby become taxable. Cf. *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107. As the court below pointed out (R. 47, 48–49), Congress provided for a tax to be automatically imposed upon corporations which come within specific objective standards without any necessity of proving a purpose to avoid the surtax on stockholders. No general exemption of foreign corporations was necessarily contemplated, since it cannot be assumed that all of the individual stockholders of a foreign personal holding company will themselves be aliens.

2. Where, as here, all the stockholders are aliens, it does not follow that a foreign corpora-

tion would for that reason be denied credit for dividends paid, under Section 27 of the Revenue Act of 1936 (Appendix, *infra,* p. 9). Section 27 (h) provides that no credit shall be allowed where distributions are not taxable "in the hands of such of the shareholders as are subject to taxation." The purpose was that the credit be not denied where distributions are made to stockholders who are not subject to the income tax. See H. Rep. No. 2475, 74th Cong., 2d Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 667, 674). Thus it was intended that the credit should depend upon the character of the property distributed rather than the taxable status of the stockholders. The distribution here consisted of cash and if, as taxpayer contends, its shareholders are not subject to taxation, then Section 27 (h) does not deny the credit. The credit was denied here solely on the ground that the taxpayer had forfeited its right thereto under Section 233 by failing to return the required information. (See note (1), *supra,* p. 3.)

The taxpayer makes three further contentions which likewise present nothing substantial for review and are without merit.

The first of these (Br. 14) is that the imposition of the tax interferes with the internal affairs of the taxpayer and gives the statute extraterritorial effect. Of course, if this is so, the same is also true of the income tax imposed by Title I. No one would question the power of Congress to im-

pose an income tax on the taxpayer corporation in respect of its income derived from sources within the United States. The tax here is merely a surtax imposed in addition to the income tax imposed by Title I.

The second contention (Br. 15) is that the surtax was imposed upon the taxpayer in violation of the provisions of the 1855 Treaty between the United States and Switzerland, which requires equal treatment by each country of the citizens of the other. The contention is obviously grounded upon the taxpayer's mistaken interpretation of Section 27 (h), under which it would allegedly be denied the dividends-paid credit allowed by subdivision (a) of the section.

The third contention (Br. 19–20) is that the regulations which the Commissioner promulgated under Section 102 of the Act apply as well under Section 351. But the tax under Section 351 is a separate and distinct tax from that imposed by Section 102. The two taxes are imposed under different titles, and they were deliberately separated in order to create a class where the tax should not depend upon the purpose of the profit accumulations.[2] Accordingly, it is entirely logi-

[2] See Preliminary Report of the Subcommittee of the House Ways and Means Committee entitled Prevention of Tax Avoidance, 73d Cong., 2d Sess., submitted December 4, 1932, p. 7; also H. Rep. No. 704, same Congress and session, pp. 11–12 (1939–1 Cum. Bull. (Part 2) 554, 562–563), and S. Rep. No. 558, same Congress and session, pp. 13–14 (1939–1 Cum. Bull. (Part 2) 586, 596–598).

cal that the regulations promulgated for the administration of the two taxes should reflect this difference.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

NOVEMBER, 1943.